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Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final decision or order on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include sexual harassment; sexual orientation; retaliation; disability claims involving current illegal drug use; proving the existence of a disability; and common issues that arise in selection/promotion cases, such "pre-selection", the use of subjective criteria, and the "plainly superior" rule.

Also included in this issue is the seventh in a series of articles concerning frequently asked questions and answers pertaining to the rights and responsibilities of employees and employers with regard to requests for reasonable accommodation of a disability.

The *OEDCA Digest* is available on the World Wide Web at: *www.va.gov/orm*.

Charles R. Delobe

I

SEXUAL HARASSMENT BY CO-WORKER NOT ADEQUATELY ADDRESSED BY MANAGEMENT

Two recent cases involving egregious incidents of sexual harassment by a co-worker illustrate the consequences for management if it fails to respond promptly and appropriately when it learns of sexual harassment in the workplace.

The complainants testified that throughout an eight-month period a male nursing assistant sexually harassed them by repeatedly making obscene comments of a sexual nature. They also testified that the coworker repeatedly assaulted them, including, among other things, touching or grabbing them in intimate areas, and by grabbing them from behind and thrusting his pelvis against their buttocks.

The harasser admitted to engaging in some of the conduct, but only in cases where there were eyewitnesses. He defended his conduct by stating that it was only "horseplay", and that the women involved were active and willing participants.

The complainants disputed that assertion, testifying that they clearly and unambiguously communicated to the harasser that his conduct was unwelcome. Nevertheless, the harassment continued until they subsequently reported it to their supervisor.

In response to their complaints of harassment, management convened an Administrative Investigation Board ("Board"), which eventually found that the harasser had frequently subjected the complainants and at least eight other women at the facility to "off-color comments" and "unwelcome hugging of women, and flat out unwelcome and unprovoked grabbing of women when they are alone." The Board recommended disciplinary action.

During the Board's consideration of the matter, management detailed the harasser to another area where he would not come into contact with the complainants. Later, however, he was allowed to return to work in the same building where the complainants worked and, according to the complainants, would go to their work area and glare at them in an intimidating manner.

As did the Board, OEDCA found that the coworker had subjected both complainants to egregious conduct of a sexual nature, and that the conduct clearly constituted sexual harassment, inasmuch as the harasser's conduct was unwelcome and sufficiently severe and pervasive to create a hostile work environment.

Moreover, OEDCA found that the Department was liable for the harasser's conduct because it failed to take prompt, appropriate, and effective action, despite knowledge of the harassment. Although the medical center had long been aware of the harasser's egregious conduct involving female employees, its prior attempts at corrective action were inappropriate and ineffective, limited to some verbal and written counseling. For his conduct in these two cases, management officials imposed only a 12-day suspension, a punishment less

than that given other employees for far less serious offenses. Moreover, they granted a request to allow the suspension to span two separate pay periods to lessen the financial impact on the harasser. Finally, they permitted the harasser to return to work in the same building where the complainants worked, where he continued to cross paths with, and glare at, them.

The facility director conceded that many officials at the facility were of the opinion that harsher punishment, including removal, would have been more appropriate. Other officials, however, feared that such action might provoke a union challenge or an appeal to the Merit Systems Protection Board. OEDCA concluded that such fears do not justify or excuse a failure to take appropriate action. In this case, management's actions were too little and too late. OEDCA accordingly found in the complainants' favor and awarded them appropriate relief.

II

EMPLOYEE PROVES SEXUAL HARASSMENT, BUT MANAGEMENT IS NOT LIABLE BECAUSE IT ACTED PROMPTLY, APPROPRIATELY, AND EFFECTIVELY

The complainant alleged that a coworker grabbed her breast while giving her a congratulatory hug upon learning of some good news she had received concerning her health. Although she allowed the hug, she stated that she did not consent, by word or by action, to the breast-grabbing incident. Instead, she stated that she immediately pushed him away and told him never to do that again.

The co-worker admitted to the incident. Although he claimed the touching was not unwelcome, and suggested that there was an intimate relationship, he also admitted that the complainant told him that she was going to hit him because of the incident.

Initially, the complainant was not inclined to pursue the matter, and although she immediately reported it to two management officials in her work unit, she requested that they refrain from taking any action at that point, as she was of the belief she could handle the matter. However, after several subsequent attempts by the coworker to contact her during the following two-week period, she met with management officials and requested their assistance.

In response to the complainant's request, management immediately reassigned the coworker to a different unit and ordered him to have no further contact with the complainant. Next, the facility head convened an Administrative Investigation Board ("Board) that reviewed the matter and issued a report finding that the breast-grabbing incident occurred as alleged, that the incident was unwelcome, and that the harasser thereafter continued to create a hostile environment for the complainant by repeated attempts to contact her shortly after the incident. Moreover, the Board found that, despite explicit instructions from his supervisor to avoid the complainant following his reassignment, he continued to visit her work area.

Within 30 days of receipt of the Board's

report, management initiated action to terminate the harasser; and within 60 days of the Board's report, the harasser was terminated.

This case illustrates a few often-misunderstood principles of sexual harassment law. First, while a claim of hostile environment sexual harassment generally requires proof of more than just an isolated incident or group of isolated incidents, a single incident involving an intimate touching that is unwelcome, such as occurred in this case, will suffice to satisfy the legal requirement that the unwelcome conduct was "severe or pervasive."

Second, even if a complainant succeeds in proving that sexual harassment by a co-worker[1] occurred exactly as alleged, the employer may still avoid liability for the harassment, provided it takes prompt, appropriate, and effective action upon learning of the harassment. In the first case, management failed to do so; hence it was held liable for the harassment. In this case, management took prompt, effective, and appropriate action, and was thereby able to avoid liability for the harasser's behavior.

III

MANAGEMENT'S EXPLANATION IN A SELECTION ACTION FOUND TO BE A PRETEXT FOR RETALIATION

OEDCA recently issued a final agency decision finding retaliation in a case that illustrates the consequences for managers and supervisors who are unable to support the reasons they articulate for the actions they take. It also illustrates the importance of a carefully planned and structured interview process.

The complainant, a Lead Patient Services Assistant, GS-5, applied but was not selected for any of four advertised vacancies for the position of Lead Patient Services Assistant, GS 6/7. The individual primarily responsible for the complainant's nonselection was the Chief of Ambulatory Care and Processing (AC&P).

Prior to his nonselection, the complainant had filed two formal EEO complaints. In the second complaint, he had named the Chief (AC&P) as the responsible management official (RMO), the same person responsible for his nonselection in this complaint.

The complainant satisfied his threshold burden of presenting a *prima facie* case of retaliation. He had engaged in prior EEO complaint activity, the selecting official was aware of his prior complaints, and his nonselection occurred within a relatively short period of time after the filing of his second complaint.

The selecting official likewise satisfied her legal burden of articulating nondiscriminatory reasons for her selection decision. Specifically, she stated that the complainant did not possess as many skills as the persons selected and, in a memorandum given to the complainant, mentioned a few areas in which he was lacking, namely, volunteering and working irregular tours.

[1] The rules for employer liability are different when a supervisor is guilty of the harassment.

At this point, the complainant had the burden of proving by a preponderance of the evidence that the reasons articulated by the selecting official were not the real reasons for her decision, but were instead a pretext to mask a retaliatory motive. He succeeded in doing so.

The selection decision was based, at least in part, on the results of interviews. The interview process, however, was poorly structured, interview notes were vague and difficult to follow, the criteria for judging the candidates during the interviews were unclear, and there was no apparent system for rating the applicants being interviewed.

One of the reasons given for the complainant's nonselection was that his responses were "not of the same caliber as the four individuals selected", and that the responses "lacked insight." No explanation, however, was offered to support these vague conclusions.

The primary reason cited by the selecting official was "past performance." She noted areas in which she considered the complainant to be deficient, such as not volunteering, not being willing to work odd shifts, and not being a team player. The complainant, however, presented documentary evidence refuting these reasons. The documents showed that he had volunteered and had worked irregular shifts. Moreover, he produced a memo written a year earlier in which the selecting official referred to him as a "team player."

The selecting official also claimed that it was not possible for her to have retaliated against the complainant because she was not even aware of his prior EEO complaint activity. Again, facts in the record refuted her assertion. As noted above, one of his prior complaints named her as the official responsible for the alleged discrimination; and the evidence showed that both an EEO counselor and an EEO investigator interviewed her about that complaint.

OEDCA concluded that the selecting official lacked credibility, and that the reasons she articulated for not choosing the complainant were pretextual. Accordingly, OEDCA issued a decision finding retaliation and awarded the complainant appropriate relief.

IV

VA HELD LIABLE WHERE FEMALE EMPLOYEE SEXUALLY HARASSED MALE COWORKERS

The Complainants, both male, alleged that a female coworker, a secretary who worked in a nearby area, sexually harassed them on numerous occasions over a period of several months, beginning in November 1998. They stated that the harassment took the form of lewd acts and sexually suggestive comments that created an abusive and hostile work environment and interfered with their ability to work.

Both complainants communicated to the harasser that her conduct was unwelcome, but she typically responded to their objections by laughing at them.

Another male employee testified that the harasser had made sexually suggestive comments to him, and other witnesses

presented testimony concerning the harasser's inappropriate attire in the workplace. Although the harasser denied all of the alleged conduct, the EEOC judge found the complainants to be more credible than the harasser.

The complainants first mentioned the harasser's behavior to their supervisor at a meeting in August 1999, but they did not clearly communicate either the type of behavior involved or that it was unwelcome. However, they again reported the sexual harassment to the same supervisor - this time in specific detail - during a September 1999 meeting. The supervisor took no action after receiving their report.

OEDCA agreed with the EEOC administrative judge's conclusion that the conduct in question was unwelcome and sufficiently severe to constitute sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended.

OEDCA also agreed that the Department is liable for the harassment because it failed to take prompt, appropriate, and effective action after learning of the unlawful behavior. The EEOC judge noted, however, that the complainants' failure to report the matter prior to September 1999 reduced the amount of their damages award.

The lesson here for supervisors is obvious. Failure to take prompt, effective, and appropriate action upon receipt of a report of sexual harassment by a non-supervisory employee[2] will result in the VA being held liable for the unlawful conduct.

The lesson for victims of sexual harassment is equally clear. Allowing the harassment to continue for a lengthy period of time before bringing it to the attention of an appropriate management official could result, depending on the facts of the case, in a finding that the employer is not liable, or in a significant reduction in the amount of any damage award if there is a finding of liability.

V

APPLICANT WHO TESTED POSITIVE FOR ILLEGAL DRUG USE NOT DISABLED – HENCE NOT PROTECTED BY THE REHABILITATION ACT

A veteran patient in the VA's Compensated Work Therapy (CWT) program, applied for a regular, full-time position as a Federal employee at the hospital where he was a patient. He later received an offer of employment as a Housekeeping Aid.

Around the same time that he had applied for the position, he received notification of his termination from the CWT program for failing to remain free of substance abuse. When the officials who hired him were advised of this matter, they withdrew their offer of employment. The record shows that they withdrew the employment offer after he had twice tested positive for cocaine and other opiates.

The veteran thereafter filed an EEO complaint alleging that the withdrawal of the employment offer constituted discrimination against him on account of

[2] The rules for employer liability are different when a supervisor is guilty of the harassment.

his drug addiction. Following an agency investigation and a subsequent review of the complaint by an EEOC administrative judge, OEDCA issued a final order agreeing with the EEOC judge's decision that the complainant had failed to show that he was disabled.

The Rehabilitation Act and *The Americans with Disabilities Act* do afford protection to individuals who are participating in, or who have successfully completed a supervised drug rehabilitation program, or who have otherwise been rehabilitated successfully, provided they are no longer engaging in the illegal use of drugs. Also protected are individuals who are erroneously regarded as engaging in illegal drug use, but are not engaging in such use.

The above laws, however, do not protect individuals who are currently engaging in illegal drug use, as they specifically exclude from the definition of the terms *disability* and *qualified individual with a disability* individuals who are currently using illegal drugs.

In this case it was undisputed that the complainant was engaged in the use of illegal drugs at the time the employment offer was withdrawn. Hence, he did not fall within the definition of a *qualified individual with a disability,* and was thus unable to prove that the hospital discriminated against him because of a disability.

VI

COMPLAINANT'S FAILURE TO OFFER PROOF OF SEVERITY OF HEARING IMPAIRMENT AND MANAGEMENT'S AWARENESS OF IT RESULTS IN FINDING OF NO DISCRIMINATION.

The complainant was fired from her job as a medical supply technician before the expiration of her probationary period. The reasons given for removing her were her leave usage, error rate, and work productivity.

In response, the complainant claimed that her removal was due to her disability, which she described as a hearing impairment. Her supervisor, however, testified that she did not become aware of the hearing impairment until after the complainant filed an EEO complaint. She further noted that the complainant had never indicated there was a problem understanding her, and that she had observed the complainant talking to coworkers in the break room and never heard any mention of a hearing impairment.

After reviewing all of the evidence in the record, OEDCA concluded that, while the complainant had presented evidence of a hearing impairment – she wore hearing aids in both ears – she provided no evidence, despite a request to do so, regarding its severity or the degree to which the hearing aids improved her ability to hear. Moreover, she presented no evidence that the immediate supervisor who fired her was aware of the hearing impairment. Finally, although there was some evidence that her second-level supervisor was aware of a hearing impairment, there was no indication in the record that that individual perceived the complainant as substantially limited in her ability to hear.

In view of the above, OEDCA concluded that the complainant failed to prove that her hearing impairment constituted a disability, as that term is defined by *The Rehabilitation Act of 1973* and *The Americans with Disabilities Act of 1990*, and, hence, failed to prove that she was a "qualified individual with a disability." Absent such proof, she was unable to establish even a *prima facie* case of disability discrimination.

This case illustrates some common reasons why complainants are often unable to prevail on their disability discrimination claims. First, it is not enough merely to prove the existence of a physical or mental impairment. A complainant must also **prove** that the impairment **substantially limits** a major life activity. An impairment substantially limits a major life activity if it: (1) prevents an individual from performing that activity, or (2) significantly restricts the duration, manner, or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity.

Second, even if the impairment would ordinarily be substantially limiting, it would not constitute a disability if mitigating measures, such as the use of medication or assistive devices, result in no limitation, or a limitation that is no longer substantial.

Finally, even if an individual has a substantially limiting impairment and, hence, a disability, an individual cannot prove disability discrimination – not even a *prima facie* case of such discrimination – if he or she is unable to prove that the person responsible for the personnel action or matter complained of was aware of the disability.

VII

EVIDENCE PRESENTED BY COMPLAINANT NOT SUFFICIENT TO PROVE THAT REASONS GIVEN FOR NOT PROMOTING HER WERE A PRETEXT FOR DISCRIMINATION

OEDCA recently accepted an EEOC administrative judge's decision that a complainant was not discriminated against on account of her race, gender, and age in connection with her nonselection for the position of Chief of Voluntary Service and Community Relations. This case highlights several issues and common misconceptions that frequently arise in nonselection and nonpromotion cases.

Along with several other applicants, the complainant applied and was found qualified for the above position. Despite her qualifications, she was passed over in favor of a male applicant who was younger and of a different race. The complainant thereafter alleged that her nonselection was due to her race, age and gender.

As proof of discrimination, the complainant claimed the following: (1) in her opinion her qualifications were superior to those of the selectee, (2) the selecting official should have given more weight to her greater length of service, (3) some of the reasons articulated by the selecting official were "subjective", and (4) the selectee was "pre-selected."

The EEOC administrative judge correctly dismissed all of these assertions as insufficient, under the facts of this case, to prove discriminatory intent.

First, the judge noted that the complainant's mere opinion that she is better qualified than the selectee – a not uncommon belief among disappointed applicants –- is not evidence of that fact.

Second, while the complainant had the necessary qualifications and greater length of service than the selectee, the selecting official found the selectee to be better qualified because of his consistently "outstanding" performance ratings, recent successes in integrating and moving departments and facilities to new sites, his superior educational attainments, his excellent reputation in the agency, his facility with public relations, and his demonstrated leadership when he served in the position in an "acting" capacity prior to being selected.

The judge correctly noted that management officials are free to exercise their own business judgment as long as that judgment is not based on discriminatory criteria. Thus, although the complainant had more seniority, and although she believed that seniority should have been a decisive factor in her favor, management was not required to give that factor equal or more weight than other factors it deemed important and relevant.

Moreover, the judge noted that even if the complainant could show that she had "superior" qualifications (which she was unable to do in this case), such a showing, by itself, would not be sufficient to prove discriminatory intent. Instead, the complainant would have to show that her qualifications were "plainly superior", a much more difficult standard. The term "plainly superior" generally means a wide disparity in the qualifications of a complainant and the selectee. As the EEOC judge noted, absent a showing that the complainant's qualifications are "plainly superior", the judge has no authority to substitute his or her own judgment for that of a selecting official, who is in the best position to understand the needs of an organization and the qualifications of the applicants.

As for the subjectivity of some of the reasons given for her nonselection, the judge reiterated the basic principle that, while employers may not use subjective reasons as a guise, or pretext, for discriminatory practices, subjective reasons for promotion decisions are common and often appropriate and necessary, especially when management level jobs are involved, as in this case. Courts have frequently noted that employers are entitled to make their own subjective business judgments, however misguided or unfair they may appear to an observer, for any reason that is not discriminatory.

Finally, the judge dismissed the argument that the individual chosen was "pre-selected." It was clear from the record that the designation of the selectee as Acting Chief gave him a competitive advantage over other applicants, given that his performance while acting was a consideration in his selection. It is even possible, and perhaps probable, that the selecting official already had the selectee in mind for the position when designating the selectee as "Acting." Such facts, however, do not necessarily prove

discriminatory intent. "Pre-selection", by itself, does not violate Title VII of the *Civil Rights Act*. Such a violation requires proof of discriminatory intent.

Indeed, in many cases, evidence of pre-selection can actually prove the absence of a discriminatory intent. For example, it is not uncommon for selecting officials to know in advance whom they will select or hire for a particular job, even before they announce a vacancy and, hence, before they even know the identity and race, gender, age, *etc*. of other individuals who might apply. Such a situation does not suggest a discriminatory motive.

Often, "pre-selection" legitimately occurs simply because the selecting official has previously recognized the high-level performance and ability of an individual and has already made up his or her mind to select that individual before the vacancy is even announced. In such situations, a factor other than discrimination is the motive.

While pre-selection might, and usually does, seem unfair to a disappointed applicant, it does not violate civil rights laws, unless there is persuasive evidence that the pre-selection occurred <u>because</u> <u>of</u> discriminatory reasons.

VIII

FEMALE EMPLOYEE'S APPEARANCE AND CONDUCT, ALTHOUGH UNUSUAL, DID NOT CONSTITUTE SEXUAL HARASSMENT

The complainant, a physician, alleged that a female colleague, an Executive Nurse, subjected him to sexual harassment, resulting in a hostile work environment. He described her appearance as "garish", explaining that she dressed inappropriately, as if she were attending a cocktail party. He further described her as a "toucher", stating the she would shake hands with both hands. Moreover, he alleged that she would get too close to people when speaking to them. He also testified that he once saw her place her arms around the neck of a young man, and that she fraternizes inappropriately with various individuals. Finally, he testified that she pinched the buttocks of two of his subordinate employees -- one male and one female. Both employees corroborate that the pinching incidents occurred. One of them, however, the male, did not find it objectionable; nor did he think the conduct was sexual in nature. The female employee did complain about the incident, which she claimed occurred in an elevator with several other persons present.

The Nurse Executive testified that she is a "hugger" and, by nature, a "warm person." She denied that any of her conduct was offensive or sexual in nature. In addition, she denied pinching the buttock of the female employee, noting that a subsequent investigation by an administrative board found insufficient evidence to conclude that the incident happened. She opined that the complainant resented her because she is a woman and because she is "uppity."

After reviewing the evidence in the record, OEDCA issued a final agency decision finding that sexual harassment did not occur. The evidence did show that the Nurse Executive's appearance and

manner were somewhat unusual. She tends to stand out in a crowd. The record also confirmed that she is a "toucher" and that she hugs and kisses others readily. Moreover, despite the administrative board's finding regarding one of the pinching incidents, OEDCA concluded that the preponderance of the evidence suggested that both pinching incidents probably did occur. Finally, the evidence did support the complainant's contention that the Nurse Executive shook his hand using both of her hands.

Although the evidence supported the complainant's assertions regarding the Nurse Executive's conduct, OEDCA concluded that the conduct did not constitute sexual harassment, as that term has been defined by several U.S. Supreme Court decisions. In order for conduct to rise to the level of unlawful sexual harassment in violation of Title VII of the *Civil Rights Act of 1964*, the conduct must be (1) unwelcome, (2) sexual in nature, (3) it must have occurred because of the complainant's sex, and (4) it must be sufficiently severe or pervasive to create an objectively hostile environment.

Admittedly, the Nurse Executive's manner was unwelcome, at least as far as the complainant was concerned. However, except for the two-handed handshakes, the complained-of conduct was directed at other individuals. The complainant did not identify any incidents or conduct directed at him that could reasonably be construed as sexual in nature. At most, the evidence showed that the Nurse Executive was a warm, outgoing, demonstrative, and physical person, who readily invades the "personal space" of others.

In addition to not being sexual in nature, the conduct in question does not appear to have occurred because of the complainant's sex. In most sexual harassment cases, this element of proof is easily satisfied because the harassing behavior is usually not directed against both sexes. In this case, however, the evidence demonstrated that the Nurse Executive's manner was not based on the sex of the complainant or anyone else. The evidence showed that she is the way she is, regardless of who is present. She hugs and kisses both men and women. Even the pinching incidents involved both sexes. Moreover, the only witnesses who found her manner objectionable were a male (the complainant) and the female she pinched.

Finally, the record did not show behavior that was so "severe or pervasive" as to create an abusive and hostile work environment for the complainant. The Supreme Court has stated that Title VII is not a "general civility code"; and for conduct to be unlawful, "[it] must be extreme to amount to a change in the terms and conditions of employment". Here, none of the behavior directed at the complainant was severe enough to create an objectively hostile work environment.

A word of caution is in order, lest the reader misunderstand the lesson in this case. If the above facts were slightly different, the outcome may have been different. The courts and the EEOC have held repeatedly that even a single incident involving an intimate touching, such as the buttocks pinching incidents,

would be serious enough to satisfy the requisite "severe or pervasive" standard. In this case, however, the complainant did not claim that the Nurse Executive pinched him on the buttock. Had he made and proved that claim, and had he shown that the Nurse Executive's physical conduct against him was because he is a male, he would have been able to prove that sexual harassment occurred.

A further word of caution is in order. We do not wish to suggest that an individual may inappropriately touch employees and get away with it, as long as he or she does it to both males and females. Although several appellate courts are of the opinion that it is not sexual harassment if the conduct is directed equally against both males and females, the Equal Employment Opportunity Commission has held, at least in one case, that "equal opportunity harassers" are not immune from Title VII's prohibitions. At the very least, such behavior would constitute serious misconduct, for which the wrongdoer could and should be punished.

The real lesson here is this: touching other employees can be risky business. As we noted in the Summer 2000 edition of the *OEDCA Digest*, employees, managers, and supervisors should avoid touching coworkers or subordinates. An exception may be hugging a subordinate or coworker at a retirement party. We have mentioned before that some employers have instituted strict policies requiring that managers and supervisors be disciplined for touching employees, even if the touching incidents might not have resulted in a finding of sexual harassment under Title VII.

IX

FEDERAL APPEALS COURTS WARN EMPLOYERS THAT HARASSMENT AGAINST GAYS MAY, IN CERTAIN CASES, CONSTITUTE DISCRIMINATION BECAUSE OF SEX IN VIOLATION OF TITLE VII

The U.S. Supreme Court has previously ruled that Title VII of the *Civil Rights Act of 1964* offers protection to men harassed by men, and to women harassed by women, but not where the harasser's motive is the victim's sexual orientation. For that reason, complaints alleging gender discrimination due to sexual orientation have almost always failed.

Recently, however, two Federal circuit courts of appeal, the 3rd and the 9th, have recognized the validity of gender discrimination claims filed by gays, but only in certain limited circumstances. While the two courts still adhere to the principle that discrimination based on sexual orientation, *per se*, is not prohibited by Title VII, they have found that discrimination based on nonconformity to the sexual stereotypes of one's gender does constitute discrimination because of sex. In both cases, the plaintiffs were gay men who were harassed and abused for behavior that was effeminate in nature.

The two circuit courts cite as authority for their holdings an eleven year-old Supreme Court decision, *Price Waterhouse v. Hopkins.* In the *Hopkins* case, a female accountant claimed that she was told she would never become a partner in the firm, unless she acted in a

more feminine manner. The Court indicated that such a claim would be actionable under Title VII, because "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."

Hence, at least in some Federal circuits, claims alleging discrimination against gays may survive motions to dismiss for failure to state a claim, if the claim is based on a departure from sexual stereotypes and if the claim specifically articulates that basis, rather than merely alleging discrimination because of sexual orientation.

As noted above, the rulings in these cases are limited to gender non-conformance claims, and offer no remedy for gay men and women who do not appear gay.

X

FREQUENTLY ASKED QUESTIONS AND ANSWERS CONCERNING THE DUTY TO ACCOMMODATE AN EMPLOYEE'S DISABILITY

(Complaints concerning an employer's failure to accommodate an employee's disability account for a significant number of discrimination complaints filed against private and Federal sector employers. Unfortunately, this is one of the most difficult and least understood areas of civil rights law. This is the seventh in a series of articles addressing some frequently asked questions and answers concerning the reasonable accommodation requirement. This article answers some frequently asked questions as to when an accommodation might constitute an "undue hardship" on the employer.

Q.1. Must an employer provide an accommodation to a disabled employee, if doing so would cause an undue hardship on the employer's business operation?

A.1. An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. However, generalized conclusions by an employer will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity); the type of operation of the employer, including the structure

and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;

- the impact of the accommodation on the operation of the facility.

Q.2. What sources of funding must an employer consider when assessing whether an accommodation would be too costly?

A.2. The legislative history of the *Americans with Disabilities Act* (ADA) indicates that Congress wanted employers to consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly. Undue hardship is determined based on the net cost to the employer. Thus, an employer should determine whether funding is available from an outside source. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference.

If an employer determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause an undue hardship, then the employer must provide the second accommodation.

Q.3. May an employer take into account employees' or customers' fears or prejudices toward the individual's disability?

A.3. No. An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability. Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees' ability to work.

Example A: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Since the employer cannot show significant disruption to its operation, there is no undue hardship.

Example B: A convenience store clerk with multiple sclerosis requests that he be allowed to go from working full-time to part-time as a reasonable accommodation because of his disability. The store assigns two clerks per shift, and if the first clerk's hours are re

duced, the second clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Thus, the employer can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce the employee's hours. The employer, however, should explore whether any other reasonable accommodation will assist the store clerk without causing undue hardship.

Q.4. Must an employer modify the work hours of an employee with a disability if doing so would prevent other employees from performing their jobs?

A.4. No. If the result of modifying one employee's work hours (or granting leave) is to prevent other employees from doing their jobs, then the significant disruption to the operations of the employer constitutes an undue hardship.

Example A: A crane operator, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing. The ADA does not require the employer to take any of these actions because they all significantly disrupt the operations of the business. Thus, the employer can deny the requested accommodation, but should discuss with the employee if there are other possible accommodations that would not result in undue hardship.

Example B: A computer programmer works with a group of people to develop new software. There are certain tasks that the entire group must perform together, but each person also has individual assignments. It is through habit, not necessity, that they have often worked together first thing in the morning. The programmer, due to her disability, requests an adjustment in her work schedule so that she works from 10:00 a.m. - 7:00 p.m. rather than 9:00 a.m. - 6:00 p.m. In this situation, the employer could grant the adjustment in hours because it would not significantly disrupt the operations of the business. The effect of the reasonable accommodation would be to alter when the group worked together and when they performed their individual assignments.

Q.5. Can an employer deny a request for leave when an employee cannot provide a fixed date of return?

A.5. Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation. However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave. In certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the em

ployee's return nor permanently fill the position. If an employee cannot provide a fixed date of return, and an employer determines that it can grant such leave at that time without causing undue hardship, the employer has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship.

In certain situations, an employee may be able to provide only an approximate date of return. Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return. In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss, if necessary, the need for continued leave beyond what might have been granted originally.

Example A: An experienced chef at a top restaurant requests leave for treatment of her disability but cannot provide a fixed date of return. The restaurant can show that this request constitutes undue hardship because of the difficulty of replacing, even temporarily, a chef of this caliber. Moreover, it leaves the employer unable to determine how long it must hold open the position or to plan for the chef's absence. Therefore, the restaurant can deny the request for leave as a reasonable accommodation.

Example B: An employee requests eight weeks of leave for surgery for his disability. The employer grants the request. During surgery, serious complications arise that require a lengthier period of recuperation than originally anticipated, as well as additional surgery. The employee contacts the employer after three weeks of leave to ask for an additional ten to fourteen weeks of leave (*i.e.,* a total of 18 to 22 weeks of leave). The employer must assess whether granting additional leave causes an undue hardship.

Q.6. Does a cost-benefit analysis determine whether a reasonable accommodation will cause undue hardship?

A.6. No! A cost-benefit analysis assesses the cost of a reasonable accommodation in relation to the perceived benefit to the employer and the employee. Neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship. Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (*e.g.*, full-time versus part-time, salary versus hourly wage, permanent versus temporary).

Q.7. Can an employer claim that a reasonable accommodation imposes an undue hardship simply because it violates a collective bargaining agreement (CBA)?

A.7. No. First, an employer should determine if it could provide a reasonable accommodation that would remove the workplace barrier without violating the CBA. If no reasonable accommodation exists that avoids violating the CBA, then the ADA requires an employer and a union, as a collective bargaining representative, to negotiate in good faith a variance to the CBA so that the employer may provide a reasonable accommodation, except if the proposed accommodation unduly burdens the expectations of other workers (*i.e*., causes undue hardship). Undue hardship must be assessed on a case-by-case basis to determine the extent to which the proposed accommodation would affect the expectations of other employees. Among the relevant factors to assess would be the duration and severity of any adverse effects caused by granting a variance and the number of employees whose employment opportunities would be affected by the variance.

Q.8. Can an employer claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else?

A.8. No, an employer cannot claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else. In some situations, an employer will have the right under a lease or other contractual relationship with the property owner to make the type of changes that are needed. If this is the case, the employer should make the changes, assuming no other factors exist that would make the changes too difficult or costly. If the contractual relationship between the employer and property owner requires the owner's consent to the kinds of changes that are required, or prohibits them from being made, then the employer must make good faith efforts either to obtain the owner's permission or to negotiate an exception to the terms of the contract. If the owner refuses to allow the employer to make the modifications, the employer may claim undue hardship. Even in this situation, however, the employer must still provide another reasonable accommodation, if one exists, that would not cause undue hardship.

Example A: X Corp., a travel agency, leases space in a building owned by Z Co. One of X Corp.'s employees becomes disabled and needs to use a wheelchair. The employee requests as a reasonable accommodation that several room dividers be moved to make his workspace easily accessible. X Corp.'s lease specifically allows it to make these kinds of physical changes, and they are otherwise easy and inexpensive to make. The fact that X Corp. does not own the property does not create an undue hardship and therefore it must make the requested accommodation.

Example B: Same as Example A, except that X Corp.'s lease requires it to seek Z Co.'s permission before making any physical changes that would involve reconfiguring office space. X Corp. requests that Z Co. allow it to make the changes, but Z Co. denies the request. X Corp. can claim that making the physical changes would constitute an undue hardship. However, it must pro

vide any other type of reasonable accommodation that would not involve making physical changes to the facility, such as finding a different location within the office that would be accessible to the employee.

An employer should remember its obligation to make reasonable accommodation when it is negotiating contracts with property owners. Similarly, a property owner should carefully assess a request from an employer to make physical changes that are needed as a reasonable accommodation because failure to permit the modification might constitute "interference" with the rights of an employee with a disability. In addition, other ADA provisions may require the property owner to make the modifications.